Does an "As-Is" Clause in My Contract Preclude a Claim for Breach of an Express Warranty?

May 10, 2021

Easement by estoppel

***DeepRock Disposal Solutions, LLC v. Forté Prods., LLC,* 4th Dist. Washington No. 20CA15, 2021-Ohio-1436**
In this appeal, the Fourth Appellate District affirmed as modified the trial court's decision, agreeing that the claimant did not have an easement by estoppel over the properties, as it failed to establish any misrepresentation by the landowners.

The Bullet Point: Although the Supreme Court of Ohio has yet to recognize easements by estoppel, Ohio appellate courts have long applied the equitable remedy of estoppel to create an easement. As with other equitable remedies, the purpose of equitable estoppel is to prevent actual or constructive fraud and to promote justice. Specifically, Ohio appellate courts have consistently held that "[A] landowner cannot remain silent and permit another to spend money in reliance on a purported easement, when in justice and equity the landowner should have asserted his conflicting rights. If he fails to object, under these circumstances the landowner is estopped to deny the easement." Therefore, in order to successfully establish the existence of an easement by estoppel, the claimant must show "1) a misrepresentation or fraudulent failure to speak, and 2) reasonable detrimental reliance." A party claiming to own an easement by estoppel, known as the dominant estate, faces many challenges in proving the existence of such an easement over the so-called servient estate's property. One of these challenges is that Ohio courts are reluctant to find an easement by estoppel on the basis of the servient estate's passive acquiescence. Another challenge is that the claimant must demonstrate the servient estate made actual misrepresentations and that he relied upon said misrepresentations. For instance, the claimant cannot rely on an assertion made by the servient estate that may be easily verified by looking at public records or the claimant's own documents. Lastly, the claimant himself must rely on said misrepresentations, as opposed to reliance by a third party.

In this case, the plaintiff argued that it, through its predecessor, had a pipeline easement by estoppel and alleged the defendant landowners were aware of the efforts to build a pipeline, that they consented to its location and construction on their properties, and that they never objected to the same. The court disagreed and determined the landowners did not consent either verbally or in writing to the pipeline being constructed on their properties, nor was there any evidence of a misrepresentation made and, even if there had been, the plaintiff could have checked the county land records prior to commencing pipeline construction.

"As-Is" Warranties

***Cunningham v. Michael J. Auto Sales*, 1st Dist. Hamilton No. C-200087, 2021-Ohio-1390**
In this matter, the First Appellate District affirmed the lower court's decision, agreeing that an "as is" clause does not protect a seller who should have known its product was defective and who failed to disclose the defect to the buyer.

The Bullet Point: In Ohio, "as is" clauses generally preclude claims of implied warranties. On the other hand, such clauses do not bar claims on express warranties or claims if the seller knew, or should have known, of a defect in the product. This is because a buyer may justifiably rely on a seller's representation involving defects in the product being purchased. As such, a fraud claim may be maintained against a seller if the seller knew or should have known of a defect, even when the purchase agreement contains an "as is" clause.

In this case, the buyer presented evidence that the used car dealer knew the vehicle's transmission was defective prior to selling the vehicle. Despite having knowledge, the used car dealer failed to disclose the defect to the buyer. Therefore, the "as is" clause did not protect the dealer from liability under the buyer's fraud claim.

***Crenshaw v. Michael J.'s Auto Sales*, 1st Dist. Hamilton No. C-200154, 2021-Ohio-1468**
In this appeal, the First Appellate District affirmed in part and reversed in part the trial court's decision, agreeing that the "as is" clause did not negate the seller's express promise to perform repairs on the used vehicle.

The Bullet Point: Under R.C. 1302.29(B), a seller impliedly warrants that its product is merchantable and fit for a particular use. These implied warranties may be expressly disclaimed with the use of a written "as is" clause in the purchase agreement. R.C. 1302.29(C)(1). Just as a seller is able to disclaim implied warranties with an "as is" clause, it can also create express warranties. An express warranty is "any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." R.C. 1302.26(A)(1).

In this case, the used car dealer disclaimed implied warranties in the vehicle by using an "as is" clause in the purchase agreement. Despite the "as is" clause, the dealer also expressly agreed to perform certain repair work to the vehicle in a separate agreement with the buyer. As noted by the court, an "as is" clause does not negate or cancel an express promise to perform repairs. Since the dealer failed to perform the promised repairs, it breached its express agreement with the buyer. That being said, a buyer whose complaint states a claim for breach of an express warranty or agreement is insufficient to succeed on a claim for violation of the Ohio Consumer Sales Practices Act (CSPA). As the court explained, a seller must be put on notice that the buyer alleges it violated the CSPA. Here, not only did the buyer's complaint fail to mention the CSPA, but it was also void of any language regarding unfair, deceptive, or unconscionable consumer-sales practices. The buyer also failed to request treble damages. Moreover, neither the magistrate nor either of the parties mentioned the CSPA at trial. As such, the trial court erred in finding CSPA violations and awarding treble damages to the buyer.

Economic Loss Doctrine

***Navistar, Inc. v. Dutchmaid Logistics, Inc.*, 5th Dist. Licking No. 2020 CA 00003, 2021-Ohio-1425**
In this appeal, the Fifth Appellate District affirmed the trial court's decision, agreeing that the economic loss rule did not bar the fraud claim, as the defendant breached duties that were independent of those under the warranty agreement when it purposefully failed to disclose material information to the plaintiff.

The Bullet Point: In Ohio, a breach of contract does not create a tort claim. In fact, under the economic loss rule, the existence of a breach of contract claim generally prevents a plaintiff from presenting the same case as a tort claim. When the claims are based upon the same actions or conduct, a tort claim can exist independently of the breach of contract claim only if the breaching party breached a duty owed to the plaintiff separately from the duties created under the contract. Simply stated, the breaching party must have breached a duty owed to the plaintiff, even if no contract existed. Moreover, the plaintiff must have suffered actual damages in addition to the damages caused by the breach of contract. As the court explained, Ohio's economic loss rule attempts to balance recovery under tort law, which rectifies losses suffered by a breach of a duty imposed by law to protect societal interests, and recovery under contract law, which rectifies losses suffered pursuant to the terms of the breached contract. Notably, there are exceptions to the economic loss rule. The rule does not apply where the plaintiff's tort claim is "based exclusively upon [a] discrete, preexisting duty in tort and not upon any terms of a contract or rights accompanying privity" and there are resulting damages that are separate and distinct from the breach of contract.

In this case, the plaintiff brought a breach of warranty claim and a fraud claim against the defendant related to the purchase of heavy-duty commercial trucks and diesel engines. The defendant argued that the economic loss rule barred the fraud claim, but the court disagreed, finding that the fraud and breach of warranty claims were not based upon the same course of conduct. The court noted that the defendant breached duties that were independent of those which arose through the warranty provided to the plaintiff. Specifically, the defendant purposely failed to disclose material information about the trucks' reliability despite the plaintiff's inquiries, and these nondisclosures occurred prior to the sale. While the breach of warranty claim was based upon the limited warranty provided to the plaintiff subsequent to the purchase of the trucks, the fraud claim was based upon the distinct acts of the defendant's failure to disclose and concealment of material information to the plaintiff, which the defendant knew was critical to the plaintiff's decision to purchase the trucks. As such, the economic loss rule did not apply to bar the plaintiff's fraud claim.

---

download PDF with full text of cases

view past issues

Related people

Jim Sandy